Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

O'RANE M. CORNISH, SR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENT TO WRIT ADDING AT APPX. B, DISTRICT COURT JULY 2004 ORDER WHICH WAS NOT AVAILABLE AT ORIGINAL PRINTING AND FILING.

O'Rane M. Cornish, SR.
Petitioner
Represents Himself
3804 Shadyhollow Lane,
Memphis, TN 38116-4039.

July 12, 2006

This Supplement to the Writ of Certiorari, is filed pursuant to the Order of this Court, to add the July 2004 Order of the United States District Court, which was not available to Cornish at the original printing of the Writ. This Court attached a copy of that District Court Order to its letter Order requiring this supplement to be filed within sixty days. The District Court Order is at Appendix B, App. 11.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. No. 00-20056 B

O'RANE M. CORNISH, SR,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIALAND DENYING REMAINING PENDING MOTIONS

Before the court is the motion of the pro se defendant, O'Rane M. Cornish, Sr., for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, which provides in pertinent part that "the court may vacate any judgement and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A determination of whether a new trial is warranted lies within the sound discretion of the trial court. United States v. Monus, 356 F.3d 714, 716 (6th Cir. 2004), reh'g en banc denied (Mar. 15, 2004). The Sixth Circuit utilizes a four-part test in ruling on the appropriateness of a new trial: (1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the new evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal if the case were to be retried. United States v. Dupree, 323 F.3d 480,488 (6th Cir. 2003)(citing United States v. Glover, 21

F.3d 133, 138 (6th Cir.), cert. denied, 513 U.S. 948, 115 S.Ct. 360, 130 L.Ed.2d 314 (1994)). Evidence that is "newly available" as opposed to "newly discovered" does not come within the ambit of the Rule and is not a sufficient basis upon which to grant a motion for a new trial. United States v. Turns, 198 F.3d 584, 586-88 (6th Cir. 2000), reh'g and suggestion for reh'g en banc denied (Feb. 25, 2000); Glover, 21 F.3d at 138-39. Rule 33 motions are disfavored and courts are instructed to grant them with caution. Turns, 198 F.3d at 586. The movant bears the burden of showing that a new trial should be granted. United States v. Seago, 930 F.2d 482, 488 (6th Cir. 1991).

Before turning to the merits of the motion, the court finds it necessary to briefly review the history of this case. Cornish was indicted on March 15, 2000 on charges of wire fraud, money laundering, bank fraud, and making a false statement on a loan application, in violation of federal law. He was convicted on all counts on February 8, 2001, after a trial at which he was represented by counsel, and is currently serving a sentence in federal prison. At the time of trial, the case had been pending for 11 months. Following his conviction, Cornish filed a pro se Rule 33 motion for a new trial based on newly discovered evidence. After permitting the defendant six months in which to produce the new evidence with no results, the district court denied the motion. In her order of denial entered August 3, 2001, District Judge Julia Gibbons noted that, even though the court was aware Cornish had received the documents he claimed were new evidence during the six-month period, he never supplemented his motion or provided them to the court. The defendant appealed both his conviction and the denial of the Rule 33 motion to the

Sixth Circuit Court of Appeals, which affirmed the lower court's decision in an opinion dated June 12, 2003. See United States v. Cornish, No. 01-6132, 2003 WL 21376949 (6th Cir. June 12, 2003). The second motion for a new trial currently before the court was filed November 2003.

With respect to the merits of the motion, the government points out in its response that the "new" evidence was known to the defendant at the time of trial and, therefore, cannot be considered "newly discovered". As previously noted, the Sixth Circuit distinguishes between evidence that is "newly discovered" and that which is "newly available". In Glover, the Court observed that

> **Glover is unable to establish that the evidence offered..."was discovered after the trial" and thus he fails to carry his burden of proof. Glover acknowledges that he was well aware of the [evidence] prior to trial... While the [evidence] may have been newly available, it was not in fact "newly discovered evidence" within the meaning of Rule 33.**

Glover, 21 F.3d at 138. "The key to deciding whether evidence is 'newly discovered' or only 'newly available' is to ascertain when the defendant found out about the information at issue." Turns, 198 F.3d at 587.

In support of his motion, the defendant avers that the evidence he now seeks to present consists of documents until recently in the possession of his civil counsel, Charles Dickinson, who died in 1997.[1]. He

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According to Cornish, Dickinson represented him in a civil suit arising from the same facts as the instant criminal prosecution.

presents the affidavit of Rick Dickinson, Charles Dickinson's son, who states that after his father's death he removed several boxes of files from the elder's Memphis office and transferred them to his home in Nashville. Some of the boxes bore Cornish's name but the affiant's efforts to locate his father's client were unfruitful until February 2001, when Cornish's whereabouts became known to Dickinson through an investigator. Shortly thereafter, Dickinson shipped Cornish's records to him. It is the defendant's assertion, however, that because of prison transfers and various difficulties with prison personnel, he did not receive the boxes until May 2003.

In the cases reviewed by the court, the "newly available"/"newly discovered" dichotomy generally arises when co-defendants or other witnesses who refuse to testify at trial change their minds afterward, resulting in a motion for new trial. As the court stated in Turns, "[a] witness's shifting desire to testify truthfully does not make that witness's testimony 'newly discovered' evidence". Turns, 198 F.3d at 587. In the court's view, the evidence presented on the instant motion falls into the "newly available" category. That said, as the fact pattern in this case is somewhat unique, the court deems it prudent under the circumstances to consider the other factors. In doing so, the court finds that, even assuming the evidence was "newly discovered" and the defendant's efforts to locate it constituted due diligence, based on the following, a new trial is not warranted.

Count 1 - Wire Fraud.

With respect to Count 1, the Sixth Circuit held that:

> **Sufficient evidence was presented to establish wire fraud. Evidence is sufficient to sustain a conviction for wire**

> **fraud where the government establishes: 1) the existence of a scheme to defraud; 2) the use of wire communications to further the scheme; 3) the intent to deprive a victim of money or property; and 4) material deceit. The jury could properly conclude from the witnesses' testimony that Cornish, as owner of 6C/Dahcor Industries, had devised an elaborate scheme to defraud two companies, PFS and Fed Funds, of more than $313,000, and that Cornish used wire communications to further his scheme by faxing his application to sell an account receivable to PFS. The deceit was material because the fraudulent information induced Fed Funds to purchase the account receivable.**

Cornish, 2003 WL 21376949, at *1.

The defendant argues that evidence in the form of letters and meronda would have shown, had he been able to produce them, that one of the government's witnesses, Warren Rosen, was a liar. According to the evidence at trial, Rosen was the president of performance Financial Services(PFS), a firm that sold accounts receivable financing. Cornish, indicating that he owned a firm called 6C/Dahcor Industries, applied for financing from Rosen's firm in 1995, representing that he had an account receivable from an entity identified as ICFS Manufacturing Technologies for construction of a warehouse. The testimony revealed that Rosen made several requests for additional information and documentation, and corresponded with certain individuals connected with Manufacturing Technologies. Two of these individuals were Cynthia Snate, who told Rosen when he telephoned Manufacturing Technologies that she was the firms treasurer, and Al Townsend, the purported secretary of 6C/Dahcor. Rosen ordered a credit

report on Manufacturing Technologies, which revealed that information had been submitted to Dunn & Bradstreet showing an address for the business at 3595 Regal in Memphis with a telephone number that, according to the testimony of a BellSouth employee, rang at Cornish's home. In addition, William Scott Vaught, who conducted business as Great Southern Corporation at 3595 Regal in Memphis, offered testimony that he had been at that location since 1973; had never heard of Manufacturing Technologies, ICFS or 6C/Dahcor; and that no construction had occurred on the property. Cornish's wife, Aldith Snate Townsend Cornish, testified that her husband had requested she have a signature stamp prepared bearing the name "Al Townsend", whom she did not know, and that he had done business under the name Manufacturing Technologies in the past. After receiving documentation to support the application, Rosen's firm wired over $393,000 to Cornish's company in Memphis, which was never repaid despite numerous assurances by the defendant.

The movant contends that newly discovered evidence reveals Rosen falsely claimed to have received an award from the National Association of Minority Contractors; to have entered into a contract with the Department of Commerce to participate in minority business financing; and to have not been a "broker" when in fact he was. This evidence is of questionable relevance to say the least and, as Cornish himself avers, is offered solely for the purpose of impeaching Rosen's credibility. Thus, it cannot sustain a motion for new trial. See Dupree, 323 F.3d at 488 (holding that new evidence cannot be merely impeaching). Nor would it have likely produced an acquittal if the case were to be retried. See id.

The defendant makes a similar argument with respect to Willis Beale, another prosecution witness. Beale was president of Fed Funds, the company involved in the factoring of accounts receivable that funded the transaction set up by PFS culminating in the transfer of funds to Cornish. The defendant proffers evidence in the form of letters to show that Beale's trial testimony to the effect that his company was a "bank" or akin to a "bank" was a lie. Cornish also offers documentation to show that, although Beale testified he didn't know whether Rosen was a broker and that his relationship with Rosen's firm was at arms length, PFS and Fed Funds in fact shared the same address. As this evidence, like that presented with respect to Rosen, is for purposes of impeachment only, it does not support the granting of a new trial.

Cornish has also submitted copies of documents which he claims establish that certain documents used at trial had been altered. Specifically, he states that his Social Security number, which appeared under his signature in the original guaranty document, did not appear on the document used at trial. In addition, he submits that a handwritten disclosure he placed on the same agreement, on which 6C/Dahcor was listed as the debtor and the secured party as PFS, advising that he had known the firm Manufacturing Technologies for some time, had worked with them as an employee and representative in 1990, and was currently providing the company with "country presense"[sic] and in connection with that service had built a light assembly facility, was also missing from the document entered as an exhibit at trial. He argues this evidence supports his contentions that Rosen and Beale were liars. However, the defendant has failed to show, and the court cannot determine, in what way presentation of the documents in the form

posited by the defendant would have changed the outcome of the trial.

The defendant next attacks the testimony of Doris Austin, a government witness employed by the Memphis and Shelby County Construction Code Enforcement Division. She stated that her office issues construction licenses and permits and that it is not possible to do construction in the city or county absent a permit. According to her testimony, 6C/Dahcor could not undertake commercial construction as it held only a residential license and no permit was issued for ICFS or Manufacturing Technologies. She further related that the only commercial permit applied for by Cornish was for chines restaurants in business office buildings which he was not allowed to complete because he did not obtain the permit.

Cornish maintains that his contractor license renewal issued by the State of Tennessee, which was not in his possession at the time of trial, refutes Austin's testimony that her office issued construction licenses and permits. He also offers materials demonstrating that he in fact did perform commercial construction projects. To the extent the evidence is offered for the purposes of impeachment, a new trial based thereon is not warranted. Moreover, whether contractor licenses were issued by the state, local authorities, or both, and whether contractor licenses were issued by the state, local authorities, or both, and whether Cornish ever actually constructed other commercial buildings were not dispositive of the government's case and the court is unconvinced that the outcome of the trial would have been different had such evidence been presented.

Next, the defendant avers that newly discovered evidence consisting of time cards for government witness James Young both confirms Young's testimony that he was not the same person who signed punch list for Cornish's company and refutes his testimony that he was a construction foreman when in fact he was merely a construction helper. Young testified at trial that he was an employee of Cornish and that the only buildings built when he was construction foreman were two small sheds and that no warehouses were constructed. He further testified that he had never heard of Manufacturing Technologies. The evidence offered by the defendant as to Young is clearly cumulative and impeaching. In addition, there is nothing to suggest that evidence showing that this witness was a helper instead of a foreman would have resulted in Cornish's acquittal.

The defendant further points to documents in the possession of his former counsel indicating that the property upon which the building was supposedly constructed for Manufacturing Technologies was, unbeknownst to Cornish, an environmental Superfund site. The documents include a Commissioner's Order entered October 1991 by the State of Tennessee Department of Environmental and Conservation, Division of Superfund, in the matter of the City of Memphis and Shelby County, Respondents, along with the undated first page of an amendment to the Order and Cornish's application for a special use permit filed with the Memphis and Shelby County Office of Planning and Development on April 28, 1994. (Mot. For New Trial Based Upon Newly Discovered and Retrieved Evid. App1 at attachments 19, 20.) In his motion, Cornish sates that the Commissioner's Order "first came to [his] attention when the customer, [Manufacturing Technologies], notified him of a problem, and based upon that, Cornish

visited with the City Environmental Engineer at Memphis City Hall, and was reluctantly provided with a copy." (Mot. For New Trial Based Upon Newly Discovered and retrieved Evid. At pp. 18-19.) While the defendant does not advise the court of the date on which the notification occurred, the court may safely assume that, as Cornish is now incarcerated, it took place prior to his trial. What is abundantly clear is that, even taking as true the defendant's assertion that these documents are material, they are public records and could have been obtained prior to trial by Cornish's counsel had he deemed it necessary.

The defendant goes on to offer additional documents to show the building was in fact constructed; namely, (1) a contract for advisory services between Manufacturing technologies and Bancex FASG dated October 1994: (2) a construction proposal of 6C/Dahcor Industries, Inc. to Manufacturing Technologies dated November 1994; and (3) a delivery ticket from a concrete supplier that is largely illegible. Cornish has failed, however, to explain to the Court why these documents could not have been obtained before trial or how they are material and exculpatory.

COUNT 9-Bank Fraud.

In its opinion, the Sixth Circuit found that

> **[t]he government presented sufficient evidence to prove all the necessary elements of bank fraud. To convict Cornish of bank fraud, the government had to prove that: 1) the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; 2) the defendant did so with the intent to defraud; 3) the financial**

> **institution was insured by the FDIC; and 4) the deceit informing the scheme to defraud was material. Bank officials from First American National Bank ("First American"), now known as AmSouth Bank, testified that a check from Cagle's Farms, Incorporated, made payable to the Bunge Corporation for $113,896.39 was deposited into Cornish's Dahcor bank account. Cornish's knowledge and intent was indicated by alterations on the check, the deposit of the check, and the simultaneous deposit of a money order made out to Bunge/Dahcor. A bank official testified that the bank was FDIC insured. Finally, the alterations and the money order deposit were material to the fraud because the teller otherwise might not have accepted the check for deposit.**

Cornish, 2003 WL 21376949m at *2. With respect to Count 9, the government presented testimony at trial that Cage Farms, a Dalton, Georgia poultry company, sent a check to Bunge Corporation in payment for seed. The check was mailed to Post Office Box 30667 in Memphis, Tennessee. When the check, written in the amount of $113,896.39, was not received, an inquiry revealed that the check had been endorsed by a "Bance Corporation." An investigator for AmSouth Bank testified that the check had been deposited in 6C/Dahcor Industries account on October 27, 1998. On the same day, a personal money order from Union Planters for $28.96 payable to Bunge/Dahcor Industries was also deposited in the Dahcor checking account.

Carolyn Bell Smith, a records custodian for the United States Postal Service, testified that box 30667 was owned by Bunge Corporation. Another box in the

same postal facility, numbered 30727, was opened in 1997 by Cornish in the name of Bancex. The two boxes were in close physical proximity and, in her opinion, mail for Bunge could have been accidentally dropped into Bancex's box.

Special Agent Brian Burns offered testimony that he interviewed Cornish about the check in April 1999, recalling that the defendant acknowledged that he had cashed the check and the money order and that he was not due any funds from Cagle Farms. Burns further stated that Cornish opened the post office box for Bancex on the same day the deposit was made and that there was no Bancex Corporation affiliated with Cornish registered with the Secretary of State.

The defendant seeks to present a Postal Service Application and Voucher for Refund of Postage and Fees dated May 5, 1992 to show that he in fact had been "affiliated" with the post office box since at least 1992, rather than 1997. He also submits copies of numerous bills and letters dated from 1987 to 1996 addressed to his company, Banc-Ex, Finally, Cornish offers a copy of his credit report indicating the post office box had been his address since 1982. These documents, Cornish argues, support his testimony that he had maintained the box since around 1984 and prove Burns and Smith lied about when the box was obtained by Cornish. While there may have been some inconsistency in testimony on this point, it is immaterial as the crime for which Cornish was convicted was, in essence, the deposit into his account of a check not belonging to him. How long he had the post office box from which he may have obtained the check is of no consequence.

The defendant insists that his deposit of the check into his account was "an unfortunate confluence of circumstances." He argues that he was expecting a check in a similar amount from a company named "Cage Farms" and that the company name "Bunge" is similar to the name of one of his Jamaican-based companies which is part of his "Bance" group. Cornish claims he told Burns to look into the offshore accounts to see how the error could have occurred but the special agent never followed up. According to the defendant, one of the document retrieved from Dickinson's files contains a list of authorized signatures and depositors from Bancex International (Jamaica) Limited's financial institution in Kingston. The documents lists the company and its operating subsidiaries, which are known collectively as Bance. The defendant asserts that, had he been permitted to introduce the document at trial, which listed companies with names such as Baungi, Banceb, Baungr, Baumta, Bancegu, Bancett, Bancedm, Bancea, Bancels, Baceva and Bancear, the trier of fact could have appreciated how easily a mistake such as the one he describes could have occurred. While the document, which appears on a Mutual Security Bank Limited, Jamaica form, is not dated, it does bear a handwritten notation on its face with the date "12/95". Cornish has offered no explanation whatsoever as to why the document, which was obviously in the possession of his banker, could not have been obtained for use at trial. Moreover, considering the volume of evidence presented in this case, it is highly unlikely that this one piece of evidence would have convinced a jury that he was not guilty of the offense of bank fraud.

Count 10 - False Statement.

According to the Sixth Circuit,

> **[s]ufficient evidence existed to support Cornish's conviction for making a false statement to a bank on a loan application. Evidence is sufficient to sustain a conviction for making a false statement to a bank where the government establishes that: 1) the lending institution's deposits are federally insured; 2) the defendant made false statements to the institution; 3) the defendant knew the statements were false; and 4) the statements were made for the purpose of influencing the institutions' action upon an "application, advance,..... commitment, or loan."..... The jury could properly conclude from the witnesses' testimony thatCornish, as chief operating officer of Oralcor, Incorporated, applied For a business loan from First American, the bank was federally insured, Cornish falsely stated on the application that AIP, Random Fastners, and Alco, Incorporated, owed him amounts approximately$484,000, $289,000, and $206,000, respectively, and the statements were made to influence the bank's decision on the loan.**

Cornish, 203 WL 21376949, at *2. At trial, William Freeman, branch manager of AmSouth Bank, formerly First American Bank, testified that Cornish submitted a loan application dated October 2, 1995, in which nthe defendant represented that he and his company, Oralcor, Incorporated, had annual sales of between one million and one-and-a-half million dollars; that the company held total assets in the amount of two-and-a-half million dollars; and that Cornish had $400,000 in accounts receivable. The defendant further advised the lender that

he had $1,300,000 in construction in progress and various recently completed construction projects for which he had not yet received payment, including $484,000 from AIP; $289,000 from Random Fastners; $206,000 from Alco, Incorporated, as well as others.

In the instant motion, Cornish seeks to introduce as evidence a mechanics and materialmen's lien for Alcor, Incorporated dated may 10, 1994, as well as subcontractor invoicing documents from commercial roofers, refrigeration contractors and others who worked on the Alcor project. He argues that, now the contractors have been identified, they can be called to testify. He makes similar arguments with respect to the other projects referred to with respect to the application. The defendant does not, however, offer any explanation of how he could not have come by this information at the time of trial. The remainder of the defendant's assertions with regard to Count 10 will not be considered, as they consist simply of rehashing of Cornish's defense to the charge. Nor will the Court accept the defendant's invitation to revisit previous decisions of this court and the Sixth Circuit in this case.

For the reasons articulated herein, the motion is DENIED. In addition, the remaining pending motions in this case, all of which relate to the instant motion, are also DENIED.

IT IS SO ORDERED this 1st day of July, 2004.

/S/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE